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# Symposium, Creditors' Rights, Foreword

Charles Seligson

# CREDITORS' RIGHTS

## FOREWORD

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The *Fordham Law Review* has rendered a splendid service to the legal profession in devoting its third issue to the subject of bankruptcy. This area of the law has become increasingly important to the business community, despite the generally prosperous state of the economy. In dealing with their respective subjects, the five major contributors, all able and experienced, have taken a pragmatic approach which has emphasized the practical aspects of the problems facing the practitioner. These contributors have generously drawn upon their expertise to alert the unwary to the host of pitfalls usually encountered in the handling of bankruptcy cases. At the same time, appropriate regard has been shown for the conceptual and historical development of the theories affording solutions to the many problems.

In keeping with the theme of the symposium, Referee Rudin in his article, "Fees and Allowances to Attorneys in Bankruptcy and Chapter XI Proceedings," discusses the factors which are relevant in the determination of the quantum of compensation to be awarded to the applicant. As Referee Rudin points out, the problem generally is not to whom compensation should be awarded, since that is clearly defined in the Bankruptcy Act, especially in ordinary bankruptcy and cases under Chapter XI. The important question is "how much," and, as the referee properly notes, the decided cases emphasize that a spirit of economy must prevail in the award of compensation. But as he acknowledges, economy must not foreclose just compensation. Inadequate fees discourage participation by able and experienced attorneys and thus tend to defeat the desirable objective of realizing the maximum possible for distribution to creditors. Referee Rudin has done well to point out that "time spent" is but one of several factors to be weighed in determining the amount of the fee. As he states, accomplishments and benefits to the estate should be the controlling considerations. In the last analysis, the

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fixing of fees calls for the exercise of informed judgment and a wise discretion, and the determination of the referee or judge in this respect should not be disturbed unless there has been an abuse of discretion or reliance has been placed upon improper standards.

Messrs. Krause and Kapiloff have also taken a pragmatic approach in their consideration of "the relevant statutory, administrative, and judicial developments relating to the taxable income of bankrupt estates." This article, which deals with problems not fully explored by commentators, should be of inestimable value to the persons charged with administration of bankrupt estates. Inequities arising because of the lack of any clear distinction between the tax obligations of a trustee for a corporate bankrupt and one for an individual bankruptcy are aptly illustrated. An illuminating treatment is given to the question of taxable income during the administration of the bankrupt estate, which the authors point out "is fraught with social and economic considerations." Although existing law on the subject contains many gaps, the article is tremendously helpful in advising the practitioner of which areas have been settled and which have not.

Chapter XI was designed for the expeditious and economic rehabilitation of corporations as well as individuals. Chapter X, on the other hand, is geared to the reorganization of corporations which cannot obtain adequate relief under Chapter XI. There is no clear-cut statutory line of separation between Chapters X and XI, and the courts have been obliged to set up guidelines which frequently present difficulties in application. Recent decisions indicate a greater liberality toward the acceptability of Chapter XI petitions, in contrast with the earlier tendency to dismiss such petitions on the ground that the more stringent regulations of a Chapter X proceeding would better suit the debtor and its needs. This recent trend, its impact and probable future course are the subject of an excellent discussion by Professor Weintraub and Mr. Levin in the third paper of the symposium. The leading cases are astutely dissected to extract from each the factual circumstances which influenced the court in its choice of the type of proceeding best suited to afford adequate relief to the debtor and creditor alike. The need for an adjustment of the public debt, conclude the writers, for new management, for an accounting by management for misdeeds, or for the protection of widespread public stockholders, even where there is no public debt, are factors calling for the detailed regulatory provisions found in Chapter X.

Conversely, if there is need for the continuation of old management and no complex debt structure, and the plan is one to readjust only claims of private trade creditors, even where there is some public debt, the simplified machinery of Chapter XI may be more appropriate. Certainly the task of the lawyer in choosing the suitable chapter will be made easier by this article.

The symposium includes Referee Hiller's observations on the security aspects of chattel leases in bankruptcy. With his usual thoroughness, he explores the situations in which the long-term lease departs "from the conventional provisions that characterize bona fide lease transactions" and grants "to the lessee rights or options to acquire ownership of the leased property." These situations quite frequently present the court with a problem as to whether the lease has undergone transition from a lease to a sale. If the lease is in fact a security transaction, the lessor is an unsecured creditor, for there is no filed security agreement which is enforceable against the trustee. Clearly, the criteria by which the courts distinguish a bona fide chattel lease from a camouflaged security agreement are of extreme importance to the practicing attorney, who should welcome the help supplied by Referee Hiller.

The rights and status of sureties in bankruptcy cases of contractors, a subject of ever increasing importance in the administration of bankrupt estates, are admirably covered by Harry Gleick, a member of the Missouri Bar, in his treatise. As he notes, "with the increasing number of governmental contracts, litigation can only increase." Bankruptcy trustees, as Mr. Gleick aptly observes, "have been drawn into litigation on occasions where it was ascertained ultimately that nothing was due the bankrupt estates." Mr. Gleick makes the telling point that the surety's right of subrogation is rather ill-defined under the Bankruptcy Act and, with his customary skill and perception, he discusses priorities between the surety and the trustee and analyzes the rights of the surety under assignment. Concluding with a brief but pointed comment on the trustee's injunctive remedy, Mr. Gleick re-emphasizes the urgency of evolving "a theory supporting the concept of segregation . . . upon which all can agree."

The intensive treatment given to the problems of one specific sector of the law constitutes true service to the professionals who face these problems. Those who read this symposium will be more than amply

rewarded. The attorneys practicing in the field of bankruptcy are greatly indebted to the *Fordham Law Review* and to the contributors to the symposium, including the student scholars who labored so nobly and with excellence, for making possible this rich and varied presentation.